

BELL, McANDREWS & HILTACHK, LLP

ATTORNEYS AND COUNSELORS AT LAW

455 CAPITOL MALL, SUITE 801
SACRAMENTO, CALIFORNIA 95814

(916) 442-7757

FAX (916) 442-7759

CHARLES H. BELL, JR.
COLLEEN C. McANDREWS
THOMAS W. HILTACHK
BRIAN T. HILDRETH
CHERYL L. LOMBARD

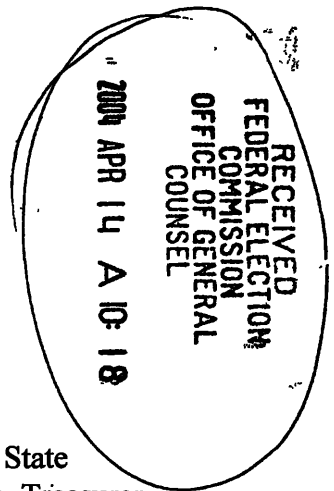
PAUL GOUGH
OF COUNSEL

1441 FOURTH STREET
SANTA MONICA, CA 90401
(310) 458-1405
FAX (310) 260-2666
www.bmhlaw.com

April 8, 2004

VIA FACSIMILE/US MAIL

Jessie B. Christensen
Attorney
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington DC 20463



Re: MUR 5367 – Response of Rescue California, A California State
Committee to Recall Governor Gray Davis and Vona Copp, Treasurer

Dear Mr. Christensen:

This is the response of the Respondents Rescue California, an unincorporated California state ballot measure committee primarily formed under California law to support the qualification of the recall of California Governor Gray Davis, and of Vona Copp, its Treasurer, to the Federal Election Commission's reason to believe determination of February 20, 2004, and the FEC General Counsel's Factual and Legal Analysis submitted to the Respondents.

The Commission's reason to believe finding is based upon the General Counsel's conclusions that: (1) Rescue California was "established, maintained, financed or controlled" by Congressman Darryl Issa, by virtue of Congressman Issa's alleged "seed money" funding of Rescue California, his own personal contributions to Rescue California, his solicitation of contributions from one of his corporations, and ongoing, substantial support of Rescue California; and (2) Rescue California was engaged in an election "other than any election for federal office" as defined in 2 U.S.C.A. § 441i(e)(1)(B). On that basis, the Commission found reason to believe that Rescue California violated section 441i(e)(1)(B) by "soliciting" contributions from sources and in amounts in excess of FECA limits, and by receiving such contributions.

1699 01

25044124218

BY FACSIMILE AND U.S. MAIL

Letter to Jesse B. Christensen
Attorney, Office of General Counsel
Federal Election Commission
RE: MUR 5367
April 8, 2004
Page 2

The Commission's position is based largely on the gloss of FEC Advisory Opinion 2003-12. In that Opinion, the Commission held that the signature gathering activities of a state ballot measure committee that was "established, financed, maintained, or controlled" by a Federal officeholder was "in connection with any election other than an election for Federal office." The Commission also found that *the same signature gathering activities* by a committee that was not established, financed, maintained or controlled by a federal candidate *were not in connection* with any election other than an election for Federal office. The Commission determined that the activities of a ballot measure committee not established, financed, maintained, or controlled by a Federal officeholder would be considered in connection with an election other than an election for Federal office only "after the committee qualified an initiative or ballot measure for the ballot." We concur with AO 2003-12 to the extent that the activities of a ballot measure committee are not in connection with an election until the measure has qualified for a specific ballot. However, concluding whether a pre-qualification activity is in connection with an election upon the basis of who may be associated with the activity is illogical.

The Respondents' positions on these issues in summary is as follows:

- (A) Congressman Issa did not "establish, finance, maintain or control" Rescue California. Congressman Issa would arguably appear to meet only one of the ten tests of "sponsorship" in FEC Regulation 300.2 (c)), namely subdivision (vii). There is no evidence before the Commission that Congressman Issa would have satisfied any of the other tests of "sponsorship" of Rescue California.
- (B) Rescue California was not engaged in activities in connection with an "election" of any kind when it raised and spent funds on the qualification efforts for a recall of then California Governor Gray Davis. The signature qualification effort was not an election because there was no certainty that an election would follow given the vagaries of the recall qualification process and the timing of recall elections under California law. Rescue California's ballot qualification efforts ended nearly one month before the recall election actually qualified for the ballot and before any election was called or held.

BY FACSIMILE AND U.S. MAIL

Letter to Jesse B. Christensen
Attorney, Office of General Counsel
Federal Election Commission
RE: MUR 5367
April 8, 2004
Page 3

- (C) The signature gathering activities that Rescue California were engaged in did not implicate the corruption purposes of 2 USCA 441i(e)(1)(B). The purpose of the law was to prevent federal office holders from collecting improper contributions from outside sources. In this instance Congressman Issa only contributed his own funds to the signature gathering process. Congressman Issa cannot be accused of trying to corrupt himself.

For all of these reasons, Rescue California and Vona Copp request the Commission take no further action in this matter against them.

Factual and Legal Presentation

Rescue California was organized on May 5, 2003 as a general purpose committee to support the recall of Governor Gray Davis. The organization's managers – Dave Gilliard, Chris Wysocki, and Natalie Blanning – were its controlling persons. None of these persons was, or is, an agent of Congressman Darryl Issa. The organization's managers would testify that at no time did Congressman Issa, or any agents of Congressman Issa, exercise any control over the committee. Congressman Issa's role was that of a donor (of his personal funds, as well as of his own corporation's funds). Rescue California is unaware of any funds other than his own personal or corporate funds that were solicited and received by Rescue California for which they were not responsible, or correspondingly, for which Congressman Issa was responsible.

A. No "Sponsorship"/ Issa Did Not "Establish, Finance, Maintain or Control" Rescue California

Congressman Issa would not have been a "sponsor" of Rescue California under 9 of the 10 "tests" set forth in Regulation 300.2(c). Specifically,

- (1) Issa did not have any authority, directly or through agents, to direct or participate in the governance of Rescue California (11 CFR 300.2(c)(ii).)
- (2) Issa did not have the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of Rescue California (11 CFR 300.2(c)(iii).)

BY FACSIMILE AND U.S. MAIL

Letter to Jesse B. Christensen
Attorney, Office of General Counsel
Federal Election Commission
RE: MUR 5367
April 8, 2004
Page 4

(3) Rescue California and Issa's committees had no overlapping membership. (11 CFR 300.2(c)(iv).)

(4) Rescue California and Issa's committees had nor have any overlapping officers or employees that would denote a formal or ongoing relationship between them. (11 CFR 300.2(c)(v).)

(5) Rescue California and Issa's committees had no successor relationships of the sort that would denote a formal relationship as predecessor and successor entities. (11 CFR 300.2(c)(vi).)

(6) Issa was not responsible for, and did not raise any identifiable money from, persons that had not been solicited by the managers of Rescue California. (11 CFR 300.2(c)(viii).)

(7) Issa, directly or through agents, did not have an active role in the formation of Rescue California. (11 CFR 300.2(c)(ix).)

(8) There is no similar pattern of receipts or disbursements by Rescue California and Issa that would indicate a formal or ongoing relationship. (11 CFR 300.2(c)(x).)

(9) Rescue California was not and is not a business entity, and therefore 11 CFR 300.2(c)) (I) would not apply.

As noted above, Congressman Issa's activity under 11 CFR 300.2(c)(vii) is admitted. However, were this template applied to any other situation, it could be said that a variety of organizations that simply benefitted from the generosity or favor of a federal official, including a variety of public charities as well as those specifically permitted to accept soft money without limitation for express or implied use for "federal election activity" under 2 U.S.C.A. 441i(d), could be considered "sponsored" under 11 CFR 300.2(c)). This would be inappropriate. For this reason, the General Counsel has strained to reach the conclusion that Issa is a "sponsor" and therefore meets the "established, financed, maintained or controlled" test. For all the reasons cited above, that conclusion is not well founded.

25044124221

BY FACSIMILE AND U.S. MAIL

Letter to Jesse B. Christensen
Attorney, Office of General Counsel
Federal Election Commission
RE: MUR 5367
April 8, 2004
Page 5

B. The Recall Qualification Effort Was Not an "Election."

As discussed in the summary above, the recall qualification effort ended well before any recall election was called. Respondents will provide under separate cover a timeline of the recall qualification and recall process that demonstrates that litigation (in which Rescue California was not involved) was required against California's Secretary of State and election officials to order them to timely process recall petition signatures in order that a recall election in the fall of 2003 even became possible. Moreover, the recall qualification was threatened by at least fourteen separate lawsuits seeking either to postpone or eliminate either the recall election or the recall replacement election. Thus, as a factual matter, there was no "election" that was certain, or even likely, at the time of Issa's contributions to Rescue California.

C. Purposes of BCRA and Section 441i(e)(1)(B) Not Implicated by Rescue California Activity

The General Counsel does not dispute that Rescue California was engaged in bona fide signature gathering activity. Rescue California's purposes were to qualify the recall of Governor Davis. These activities do not implicate the purposes of Section 441i(e)(1)(b).

BCRA section 323(e)(1)(B) (2 USCA 441i(e)(1)(B)), according to the Supreme Court, was designed to prevent the corruption of federal candidates and officeholders and to prevent circumvention of federal contribution limits, in connection with federal candidate's participation in soliciting, directing, and contributing soft money to any election other than an election for federal office. Here, the gravamen of the issue appears, based on the evidence presented, that Section 441i(e)(1)(B) was intended to prevent Issa from corrupting himself. This notion is at odds with *Citizens Against Rent Control v. City of Berkeley, supra*, in which the Supreme Court made clear that ballot measure activity is non-corrupting; moreover, nothing in the Supreme Court's decision in *McConnell v. Federal Election Commission, supra*, should give additional comfort to the General Counsel's position in this regard.

Moreover, Issa's candidacy for Governor itself during the relevant time period (from May 15, 2003 through August 8, 2003) meant that even if Rescue California had been considered an

25044124222

BY FACSIMILE AND U.S. MAIL

Letter to Jesse B. Christensen
Attorney, Office of General Counsel
Federal Election Commission
RE: MUR 5367
April 8, 2004
Page 6

affiliated committee of his state gubernatorial committee, by necessary implication, the exemption of Section 441i(e)(2) would appear to exempt Rescue as well.¹

Conclusion

For the reasons set forth above, Rescue California and Vona Copp request the Commission take no further action in this matter against them. The Commission's enforcement action trenches upon non-election activity that was not controlled by Congressman Issa, nor was a corruptible activity as held by the United States Supreme Court.

Respectfully Submitted,

BELL, McANDREWS & HILTACHK, LLP



Charles H. Bell, Jr.
Designated Counsel of Record for Rescue
California and Vona Copp

CHB:may

¹ Although the complainant in this matter contends Rescue was not Issa's gubernatorial committee, the state regulatory agency in early September 2003 addressed the question of whether a candidate for governor – either Governor Davis who was the subject of the recall or any other candidates for governor in the replacement election – could control a separate committee primarily formed to advocate on the recall question. The California Fair Political Practices Commission answered that question in the affirmative, adopting Emergency Regulation 18531.5 (and especially subdivision (c)(1)) that specifically provided that candidates could establish controlled committees (Calif. Gov. Code §82016) for such purposes. (See Attachment "A".)

BY FACSIMILE AND U.S. MAIL

Letter to Jesse B. Christensen
Attorney, Office of General Counsel
Federal Election Commission
RE: MUR 5367
April 8, 2004
Page 7

Attachment "A"

Regulations of the California Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

1. § 18531.5. Recall Elections.

(a) Definitions. For purposes of this section:

(1) "Target officer" means an elected officer who is the subject of a recall effort.

(2) "Replacement candidate" means a candidate within the meaning of Government Code section 82007 who is running to replace a target officer in the event the recall is successful and who is on the same ballot as the recall measure.

(b) Application of Contribution and Voluntary Expenditure Limits to State Recalls.

(1) Target Officer. Pursuant to Government Code section 85315, the contribution limits of Chapter 5 of the Act do not apply to contributions accepted by an elected state officer who is the target of a recall into a separate recall committee established to oppose the qualification of the recall measure or the recall election. Pursuant to Government Code section 85315, the voluntary expenditure limits of the Act do not apply to expenditures made by an elected state officer who is the target of a recall to oppose the qualification of the recall measure or the recall election.

(2) Replacement Candidates. The replacement candidates in a state recall election are seeking elective state office and therefore the contribution and voluntary expenditure limits of Chapter 5 of the Act apply to replacement candidates.

(3) Committees Primarily Formed to Support or Oppose a Recall. A recall is included within the definition of a "measure" in Government Code section 82043. Therefore, the contribution and voluntary expenditure limits of Chapter 5 of the Act do not apply to a committee primarily formed to support or oppose a recall.

25044124224

BY FACSIMILE AND U.S. MAIL

Letter to Jesse B. Christensen
Attorney, Office of General Counsel
Federal Election Commission
RE: MUR 5367
April 8, 2004
Page 8

(c) Committee Formation and Campaign Report Filing Obligations. All candidates and committees that raise and spend funds in connection with a recall have full reporting and disclosure obligations under Chapters 4 and 5 of the Political Reform Act.

(1) Target Officer. A target officer may use a committee for the office held to oppose the recall. A target officer may also establish a separate committee to oppose a recall upon receiving a notice of intent to recall the officer pursuant to Elections Code section 11021. A target officer must deposit contributions accepted in the separate committee to oppose the recall in a single bank account at a financial institution located in the State of California which is separate from any other bank account held by the officer, including any campaign bank account. The word "recall" shall be included as part of the committee name in the statement of organization filed for the committee pursuant to Government Code section 84107.

A target officer opposing a recall is not required to file a new statement of intention to be a candidate for elective office pursuant to Government Code section 85200.

(2) Replacement Candidate. A replacement candidate may establish a committee to seek elective office in a recall election. A replacement candidate must disclose all contributions received and expenditures made pursuing elective office, even if the target officer has not yet been served with notice of intent to recall. A replacement candidate is required to file a statement of intention to be a candidate for elective office pursuant to Government Code section 85200.

(3) Committees Primarily Formed to Support or Oppose a Recall (Including Recall Proponents and Opponents). A person or group of persons who raises or spends more than \$1,000 for a recall attempt qualifies as a "committee" under Government Code section 82013 when the target officer is served with a notice of intent to recall pursuant to Elections Code section 11021. Once the notice of intent to recall is given, the committee must report on its first campaign statement all contributions received and expenditures made for the purpose of influencing the electorate to sign a recall petition or to vote for or against a recall election, regardless of when the contributions were received or expenditures were made. A committee primarily formed to support or oppose the recall of an elected officer must identify in the committee name, the name of the elected officer and whether the committee is in support of or opposition to the recall.

BY FACSIMILE AND U.S. MAIL

Letter to Jesse B. Christensen
Attorney, Office of General Counsel
Federal Election Commission
RE: MUR 5367
April 8, 2004
Page 9

COMMENT: Committees active in a recall must file all campaign reports required by Chapters 4 and 5 of the Act. These reports include the following: the target officer, committees primarily formed to support or oppose a recall measure, and the replacement candidates must all file the semi-annual campaign reports and two pre-election reports preceding the recall election, required by Government Code sections 84200 and 84200.5, 84200.7 or 84200.8. In addition, committees primarily formed to support or oppose a recall measure, including a separate committee established by a target officer to oppose a recall measure, must file quarterly campaign reports required by Government Code section 84202.3. For recalls of an elected state officer, the electronic reports required by Government Code section 85309 must be also filed.

In addition, pursuant to Government Code sections 81013 and 81009.5, nothing in the Act prevents a local jurisdiction from adopting a local ordinance with additional or different requirements applicable to candidates or committees involved in recall elections in that jurisdiction, including applying contribution limits to all candidates and committees participating in the recall, so long as the local ordinance does not prevent the persons from complying with the Political Reform Act.

NOTE: Authority cited: Section 83112, Government Code.
Reference: Sections 82007, 82043, 84107, 84211, 85200 and 85315, Government Code.